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To be argued by
DUANE R. DILLS.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1931

No. 734.

UNITED STATES OF AMERICA,
Petitioner,

v.

COMMERCIAL CREDIT COMPANY, INC.,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

BRIEF FOR RESPONDENT.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1931.

UNITED STATES OF AMERICA, Petitioner, *vs.* COMMERCIAL CREDIT COMPANY, INC., Respondent.	No. 734.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

BRIEF FOR RESPONDENT.

Decision Below.

The decision of the United States Circuit Court of Appeals in this case is reported in Commercial Credit Co., Inc. *v.* United States, 53 Fed. (2d) 977. The decision of the United States District Court for the Southern District of Texas may be found in United States *v.* One Fargo Truck, 46 Fed. (2d) 171.

Question at Issue.

The question presented is whether or not it is mandatory under Section 26, Title II, of the National Prohibition Act (27 USCA 40; Chapter 85, Act of Oct. 28, 1919; 41 Stat. 315)

that an automobile used to unlawfully transport intoxicating beverage liquor (although *not* actually used in the *act of importation*) be seized and proceeded against under said statute, under which the rights of innocent lienors are protected, as held by the Circuit Court, or whether such an automobile may be proceeded against and forfeited under Sections 3061 and 3062 of the Revised Statutes (19 USCA 482, 483) for the unlawful importation of liquor, under which statute the rights of innocent lienors are disregarded and absolutely forfeited, as held by the District Court.

Preliminary Statement.

The three automobiles concerned herein were seized on different occasions, in different places, and from three different persons. *None* of them had been used in the *act of importation,* and *all* were seized while engaged in the *act of transportation.* The United States of America instituted separate forfeiture proceedings against each in the United States District Court for the Southern District of Texas, for the alleged violation of 19 USCA 482, 483 (Sections 3061 and 3062, R. S.). Commercial Credit Company, Inc., a corporation organized under the laws of the State of Texas, intervened in the proceedings, made answer to each of the three libels, moved that they be dismissed, and prayed that the automobiles be returned to it. Such prayers were denied, and the three cars ordered forfeited. Commercial Credit Company, Inc., the intervenor and present respondent, thereupon prosecuted an appeal to the United States Circuit Court of Appeals, the three causes being consolidated (R. 16). The judgments of forfeiture were *reversed* by that Court, and the United States of America, the present petitioner, thereupon sued out a writ of certiorari. Its

petition was granted by order of this Court filed on the 21st day of March, 1932 (R. 48).

Statutes Involved.

27 USCA 40 (Section 26, Title II, National Prohibition Act):

> "*Unlawful transportation of liquor; seizure and destruction of liquor and sale of vehicle.* When the commissioner, his assistants, inspectors, or any officer of the law shall discover any person in the act of transporting in violation of the law, intoxicating liquors in any wagon, buggy, automobile, water or air craft, or other vehicle, it shall be his duty to seize any and all intoxicating liquors found therein being transported contrary to law. Whenever intoxicating liquors transported or possessed illegally shall be seized by an officer he shall take possession of the vehicle and team or automobile, boat, air or water craft, or any other conveyance, and shall arrest any person in charge thereof. Such officer shall at once proceed against the person arrested under the provisions of this chapter in any court having competent jurisdiction; but the said vehicle or conveyance shall be returned to the owner upon execution by him of a good and valid bond, with sufficient sureties, in a sum double the value of the property, which said bond shall be approved by said officer and shall be conditioned to return said property to the custody of said officer on the day of trial to abide the judgment of the court. The court upon conviction of the person so arrested shall order the liquor destroyed, and unless good cause to the contrary is shown by the owner, shall order a sale by public auction of the property seized, and the officer making the sale, after deducting the expenses of keeping the property, the

fee for the seizure, and the cost of the sale, shall pay all liens, according to their priorities, which are established, by intervention or otherwise at said hearing or in other proceeding brought for said purpose, as being bona fide and as having been created without the lienor having any notice that the carrying vehicle was being used or was to be used for illegal transportation of liquor, and shall pay the balance of the proceeds into the Treasury of the United States as miscellaneous receipts. All liens against property sold under the provisions of this section shall be transferred from the property to the proceeds of the sale of the property. If, however, no one shall be found claiming the team, vehicle, water or air craft, or automobile, the taking of the same, with a description thereof, shall be advertised in some newspaper published in the city or county where taken or if there be no newspaper published in such city or county, in a newspaper having circulation in the county, once a week for two weeks and by handbills posted in three public places near the place of seizure, and if no claimant shall appear within ten days after the last publication of the advertisement, the property shall be sold and the proceeds after deducting the expenses and costs shall be paid into the Treasury of the United States as miscellaneous receipts. (Oct. 28, 1919, c. 85, Title II, §26, 41 Stat. 315.)"

27 USCA 12 (Section 3, Title II, National Prohibition Act):

"*Manufacture, sale, transportation, importation or exportation, delivery, furnishing, or possessing intoxicating liquors prohibited; exceptions.* No person shall manufacture, sell, barter, transport, *import*, export, deliver, furnish or possess any intoxicating liquor except as authorized in this chapter, and all

the provisions of this chapter shall be liberally construed to the end that the use of intoxicating liquor as a beverage may be prevented. * * *" (Italics ours, except in caption.)

27 USCA 3 (Section 5, Willis-Campbell Act, November 23, 1921, c. 134, 42 Stat. 222):

"*Effect on existing legislation.* All laws in regard to the manufacture and taxation of and traffic in intoxicating liquor, and all penalties for violations of such laws that were in force on October 28, 1919, shall be and continue in force, as to both beverage and non-beverage liquor, except such provisions of such laws as are directly in conflict with any provision of this title; but if any act is a violation of any of such laws and also of this title, a conviction for such act or offense under one shall be a bar to prosecution therefor under the other. (Nov. 23, 1921, c. 134, §5, 42 Stat. 223.)"

19 USCA 482 (Section 3061, R. S.,—Customs Law):

"*Search of vehicles and persons.* Any of the officers or persons authorized to board or search vessels may stop, search, and examine, as well without as within their respective districts, any vehicle, beast, or person, on which or whom he or they shall suspect there is merchandise which is subject to duty, or shall have been introduced into the United States in any manner contrary to law, whether by the person in possession or charge, or by, in, or upon such vehicle or beast, or otherwise, and to search any trunk or envelope, wherever found, in which he may have a reasonable cause to suspect there is merchandise which was imported contrary to law; and if any such officer or other person so authorized shall find any merchandise on or about any such vehicle, beast, or person, or in any such trunk or envelope, which he

shall have reasonable cause to believe is subject to duty, or to have been unlawfully introduced into the United States, whether by the person in possession or charge, or by, in, or upon such vehicle, beast, or otherwise, he shall seize and secure the same for trial. (R. S. §3061.)"

19 USCA 483 (Section 3062, R. S.,—Customs Law):

"'*Forfeitures.* Every such vehicle and beast, or either, together with teams or other motive power used in conveying, drawing, or propelling such vehicle or merchandise, and all other appurtenances, including trunks, envelopes, covers, and all means of concealment, and all the equipage, trappings, and other appurtenances of such beast, team, or vehicle, shall be subject to seizure and forfeiture. If any person who may be driving or conducting, or in charge of any such carriage or vehicle or beast, or any person traveling, shall wilfully refuse to stop and allow search and examination to be made as herein provided, when required so to do by any authorized person, he shall be punishable by a fine of not more than $1,000, nor less than $50. (R. S. §3062.)"

Statement of Facts.

The facts in the three cases at Bar are set out in the District Court's *Findings of fact and conclusions of law* (R. 8-11; 24-27; and 39-42), which, by stipulation of counsel (R. 14), were used in lieu of bills of exception or other statements of evidence. They may be summarized as follows:

1. De Soto Coupe seized from T. W. Lewis.

This car was purchased by one T. W. Lewis "from the Perry Motor Company of Dallas, Texas, a reputable auto-

mobile dealer" (R. 9), "under a chattel mortgage contract of sale, pursuant to which said dealer retained a purchase money lien upon such car until the purchase price thereof should have been duly paid" (R. 9). Both the mortgage and the note given by Lewis in connection therewith were then, "for a valuable consideration, sold to the Commercial Credit Company, Inc., and it (the appellant) is the owner and holder of a valid lien upon such automobile, on which there is at this time an unpaid balance of Seven Hundred and Sixty-five and 40/100 Dollars ($765.40)" (R. 10).

The District Court found (R. 10) that "such lien is a purchase money chattel mortgage lien and is bona fide; that it was created by the dealer in good faith, without any knowledge of any facts which would put the dealer upon notice that such automobile might be used in violation of any laws of the State of Texas, or of the United States"; that the appellant "acted in good faith in buying such chattel mortgaged lien; that it had no knowledge of any facts indicating, or tending to indicate, that the purchaser would use such automobile in violation of any Federal or State statute"; that the seizure was incurred "without any intention on the part of the Commercial Credit Company, Inc., to defraud the revenue or to violate the law"; and that it "had no notice that said automobile was being used for illegal purposes and knew of no facts or circumstances which would reasonably or otherwise lead them to believe that the automobile was being so used". It was found further (R. 10) that the appellant was the "legal owner of the chattel mortgage" on the car concerned; that no payment had been made thereon since October 29, 1930, and that the appellant "is under the terms of such chattel mortgage entitled to the immediate and exclusive possession of said automobile

except for the claims of the Government", as asserted in the libel proceedings.

The car was seized on the evening of October 29, 1930 (R. 8), while "*traveling* north" (R. 9) on a public highway. "The officers *stopped* the car on the highway" near Encino, Brooks County, State of Texas. (In passing, we respectfully request the Court to take judicial notice of the geographical facts that the town of Encino is over sixty miles from the Mexican border, and that no part of Brooks County lies adjacent to foreign territory.) The Court expressly found that, "*The car was being driven along the highway by T. W. Lewis with the alcohol and liquor on it at the time the car was stopped by the officers*" (R. 9). Upon searching the car, the officers found certain alcohol and liquor which "were manufactured in Mexico and smuggled into the United States without the payment of duty thereon and without being declared to United States customs officers".

The only evidence of the "importation", besides that which indicated that the containers bore what purported to be foreign labels, showed that "T. W. Lewis, the driver, admitted that he had bought the liquor in Reynosa, Mexico, at a wholesale house and arranged to have it *delivered on the American* side of the Rio Grande, and loaded it on his car at a point south of McAllen, Texas, between the town of Hidalgo and McAllen, Texas" (R. 9). *It thus appears that the automobile was never on foreign soil; that its driver did not use it in the actual "importation" of any merchandise; and that the importation of the alcohol and liquor described in the libel* (R. 4) *was fully completed before such merchandise was placed in the car.*

2. Fargo Truck seized from John Paul Brazil.

This truck was purchased by one Albert Jackson under the same circumstances as the De Soto Coupe, *supra*, the purchase money chattel mortgage being then sold to appellant for a valuable consideration, just as in that case. See R. 26. The District Court found that the chattel mortgage had been created in good faith, that the unpaid balance owing thereon was $847.30, that both the dealer and appellant were wholly innocent, and that, except for the claim of the United States, appellant was entitled to the possession of the chattel. R. 26, 27.

The truck was seized early in the morning on March 20, 1930, while traveling on a public highway in Webb County, State of Texas, about one mile north of the Rio Grande River. R. 24. The District Court found as a fact that it "was being *driven* * * * at the time (it) was stopped" by the officers. R. 26. There was no finding as to the importation of the liquor found in it, except that the containers bore genuine foreign labels. Furthermore, *there was no finding that the truck had ever been on foreign soil, or that it had been used in the "importation" of liquor or anything else.*

3. De Soto Coupe seized from A. D. Young.

The facts as to the purchase of this car are the same as in the other two cases, appellant being the innocent holder of a bona-fide purchase money chattel mortgage thereon. R. 41, 42. The Court below found that the unpaid balance due on appellant's lien was $832.08, and that, except for the claim of the Government, appellant was "entitled to the immediate and exclusive possession" of the car. R. 41, 42.

The seizure took place late on the evening of September 17, 1930, on a public highway in Brooks County, State of

Texas, which County, as hereinabove noted, does *not* border on any foreign territory. R. 39, 40. The officer "discovered this De Soto Coupe being *driven* along such highway". The car "*approached* the said officer and upon being flagged by the officer the driver thereof *stopped*" it and, upon examination, found it was carrying liquor. R. 40. The finding as to the importation was that the liquor had been smuggled into the United States by Mexican smugglers, and then loaded into the car in *Texas*. R. 40. Furthermore, the District Court expressly found that "*at the time of the arrest the respondent vehicle was being used by Young for the purpose of* TRANSPORTING the merchandise seized therein". R. 40.

POINT ONE.

Sections 3061 and 3062 Revised Statutes were repealed by the National Prohibition Act and were not re-enacted by the Willis-Campbell Act.

The cases at Bar have to do with the protection of the rights of innocent lienors and have no relation to the punishment of the culpable for violation of the Customs Laws. It is recognized that this Court has had in mind the protection of the innocent in all of its prior decisions requiring the application of Section 26 of the National Prohibition Act. The District Court for the Eastern District of New York in *The Standard Coaster,* 55 Fed. (2d) 306, at 307, says:

> "* * * It should be remembered that Mr. Justice Stone in his decision in the Richbourg Case was ruling and writing with the rights of innocent lienors in mind. He and the Supreme Court were not announcing a rule of procedure that would enable the guilty

to escape, but one that would protect the rights of the innocent. In this decision, occupying eight pages, the rights of innocent lienors are mentioned eleven times * * *."

Admittedly, under *Callahan* v. *United States,* Case No. 576, decided by this Court on April 11, 1932, the National Prohibition Act does not supersede the Tariff Laws insofar as the criminal actually violating the importation law is concerned; but where the rights of *innocent* parties are involved, the Court will be disposed to give effect to those provisions of law which *protect* the rights of the innocent, rather than to give an unreasonable application to laws which would *forfeit* the rights of the innocent. The respondent asks that this Court give effect to the express intention of Congress that the rights of innocent parties be protected where transportation of intoxicating liquor is involved. Section 26, Title II, of the National Prohibition Act (27 USCA 40) specifically protects the rights of innocent lienors, while Sections 3061 and 3062 Revised Statutes (19 USCA 482, 483) do not safeguard the rights of innocent lienors. "It is true that executive clemency may remit the forfeiture in favor of innocent persons (19 USCA secs. 520, 532), but mitigation by grace is not the equivalent of statutory immunity from forfeiture". *United States* v. *Sebastopol* (C. C. A. 2), not yet reported but now case No. 811 at Bar, as *General Import & Export Co.* v. *United States.* This is so particularly since the decision of the bureaucratic executive is not subject to review. *United States ex rel. Walter E. Heller & Co.* v. *Mellon, etc.,* 40 Fed. (2d) 808, 810 (App. D. C.—1930), certiorari denied 281 U. S. 766.

The reasoning applied in holding that the mandatory features of Section 26 of the National Prohibition Act must

be applied instead of Section 3450 Revised Statutes in the taxation cases, is equally applicable to Sections 3061 and 3062 Revised Statutes in these customs cases. They are companion statutes. Sections 3061, 3062 were enacted on July 18, 1866, (c. 184, Section 14, 14 Stat. 151), and Section 3450 was enacted July 13, 1866, (c. 201, Section 3, 14 Stat. 178). They have always been considered as on a par, one operating in the field of taxation, and the other in the field of customs.

United States v. *One Mack Auto Truck* (C. C. A. 2—1925), 4 Fed. (2d) 923;
United States v. *Almeida* (C. C. A. 1—1925), 9 Fed. (2d) 15, 16;
United States v. *One Ford Coupé* (S. D. Fla.—1930), 43 Fed. (2d) 212, 214.

Unless Sections 3061 and 3062 Revised Statutes were re-enacted by the adoption of the Willis-Campbell Act, 27 USCA 3 (42 Stat. 222, 223), they stand repealed by the adoption of the National Prohibition Act. *United States* v. *Yuginovich*, 256 U. S. 450; *United States* v. *Federal Insurance Co.* (C. C. A. 6—1922), 284 Fed. 821; *United States* v. *One Mack Auto Truck* (C. C. A. 2—1925), 4 Fed. (2d) 923. The Willis-Campbell Act did not re-enact Sections 3061 and 3062 of the Revised Statutes because they are in direct conflict with the provisions of the National Prohibition Act relative to transportation in customs cases in that they provide for absolute forfeiture of the rights of the innocent, while the National Prohibition Act protects the innocent. *United States* v. *One Packard Motor Truck* (1922, D. C., E. D. Mich.), 284 Fed. 394; *United States* v. *One Studebaker Automobile* (1930, D. C. Ariz.), 45 Fed. (2d)

430; *United States* v. *One Ford Coupé* (S. D. Fla.—1930), 43 Fed. (2d) 212. Transportation is necessarily involved in importation, just as much as concealment was involved in transportation, in *Richbourg Motor Company* v. *United States,* 281 U. S. 528. Since transportation takes place in the custom cases as it did in the taxation cases, it necessarily follows that Sections 3061 and 3062 are as much in direct conflict with Section 26 of the National Prohibition Act as was their companion statute Section 3450 in *Port Gardiner Investment Company* v. *United States,* 272 U. S. 564, *Commercial Credit Company* v. *United States,* 276 U. S. 226, and *Richbourg Motor Company* v. *United States,* 281 U. S. 528. In those cases a tax, as defined in *United States* v. *One Ford Coupé,* 272 U. S. 321, was payable in respect to the liquor being transported, just as a customs duty was payable in respect to the liquor being transported in the cases at Bar. This Court did not say or presume to say in those taxation seizure cases that the Government could not elect to prosecute the person defrauding the Government of a tax under provisions of law other than the National Prohibition Act, but this Court did hold that if the Government proceeded against the vehicle, thereby jeopardizing the rights of the innocent, then it had no election, but that the *law* made the election. The reasoning of the Court with respect to Section 3450 being in direct conflict with Section 26 of the National Prohibition Act is equally applicable to our contention that Sections 3061 and 3062 Revised Statutes are in direct conflict with the National Prohibition Act; accordingly, where the rights of innocent parties are involved, and there is a transportation of liquor, it is mandatory that the procedure must be under the National Prohibition Act. Apparently

this was the intention at the time of the adoption of the National Prohibition Act, for the sponsor of that Act, in advocating the enactment of Section 26, declared on the floor of Congress that Section 26 was designed to protect the rights of innocent lienors and owners (see Congressional Record, 66th Congress, First Session, Volume 58, Part 3, page 2902, July 19, 1919). It likewise must have been intended to protect such rights where the *Customs Laws* were involved, because that Section was supposed to answer the critics who maintained that the rights of innocent parties were jeopardized. In Congressional Record, 66th Congress, First Session, Volume 58, Part 3, page 2904, July 19, 1919, we find that one of those critics said:

> "A man's chauffeur, driving an automobile worth $4,000, carries a quart of liquor *across the line* to sell it. The owner may be perfectly innocent; he may be a man of the highest morality. * * * The automobile is merely illustrative. It may be a steamship worth $100,000. It may be aircraft worth $20,000. *It may have mortgages and liens upon it. These amendments purport to take care of that feature,* but I do not think they do that very well." (Italics ours.)

There was no provision under the Tariff Laws wherein the rights of the innocent lienors in the cases at Bar *could* have been forfeited, and, therefore, the Government had to resort to Sections 3061 and 3062, which were companion sections to the old Section 3450 Revised Statutes, in order to inflict the unjust and unreasonable penalty of forfeiture upon the innocent lienors. Since Congress has not specifically said the Government could do so, it is submitted that this Court should not so read the law as to permit unjustifiable forfeiture of the rights of the innocent.

POINT TWO.

Transportation, not importation, was the dominating enterprise, and Sections 3061, 3062 Revised Statutes are not applicable.

The Circuit Court of Appeals for the Fifth Circuit, in the case at Bar, rested its decision upon the ground that the vehicles in question were used only in transportation. The court said:

> "The vehicles involved were used only in transportation within the United States, and carried intoxicating liquors alone, and the persons in charge were arrested and for aught that appears are guilty under the prohibition laws. No reason exists why the mandate of 27 U. S. C. 40 (sec. 26 N. P. A.) should not be followed out by the officers of the United States in their efforts to condemn the vehicles" (R. 47).

None of the vehicles in the cases at Bar were used in the "importation" of the liquor. They were all used in the transportation of the liquor within the boundaries of the United States after the importation had been completed. To this extent, the vehicles in this case are distinguished from the vehicles involved in *General Motors Acceptance Corporation* v. *United States,* No. 574 at Bar.

There were three vehicles involved in the case at Bar, for which three separate petitions were filed, and the findings of fact in all of them showed *transportation within the United States.* In respect to the De Soto Coupe, motor #ECK-10429E, "The officer stopped the car on the highway", and the liquor had been loaded into the car near

McAllen, Texas (R. 9). The liquor had been smuggled in from Mexico. In respect to the Fargo truck, serial #W-207-YS, the "truck was stopped on a public highway in Webb County": "At the time the truck was stopped by the border patrol inspectors it was being driven by John Paul Brazil", and "The above described truck was being driven along the Mines Road by John Paul Brazil with the smuggled alcohol and liquor on it at the time the truck was stopped by the border patrol inspectors" (R. 25 and 26). With respect to the third car, De Soto Coupe, serial #L-172-YW, the inspector "discovered this De Soto coupe being driven along such highway; * * * the car approached the said officer, and upon being flagged by the officer the driver thereof stopped the automobile, * * *". "* * * the car had been used *to transport* the merchandise from such point (in Texas) to the place of seizure", and "at the time of the arrest the respondent vehicle was being used by A. D. Young *for the purpose of transporting* the merchandise seized therein" (R. 40).

If sections 3061 and 3062, Revised Statutes, are still available to the Government for seizures and forfeitures for importation of intoxicating liquor (*contra* see our Point One), the question presents itself whether they are available when the specific vehicles are used for purposes of transportation of smuggled liquor *within* the United States as distinguished from importation of the liquor *into* the United States. The Fifth Circuit Court of Appeals in the case at Bar held, as above stated, that since transportation only was involved, the rights of the innocent lienors must be protected under the National Prohibition Act. The Fifth Cicruit is not alone in this view. The Seventh Circuit, prior to the decision of this court in the *Richbourg case*, had similarly held that in order that the vehicles should be forfeited under the Customs Laws, they must be used in

the specific act of importation. In *National Bond & Investment Co.* v. *United States* (C. C. A. 7—1925), 8 Fed. (2d) 942), Anderson, C. J., says:

> "It does not appear from this (stipulation of facts) that the coupé was used to bring the liquor into the United States, nor is there any evidence on the question of intent. There is no evidence whatever in the record upon which the court could have found that the coupé was used in bringing the liquor from Canada into the United States * * *. The use shown was in Paris, Ill., on or about August 22, 1924. * * * Intent to defraud the United States out of customs duties may be inferred when a conveyance is used to smuggle goods into the United States, but to warrant such inference it must be established that the conveyance was so used."

No case of forfeiture under Section 3061, 3062 has been found in any other circuit where the element of transportation has been established as a fact. In the cases in all the other circuits holding that the vehicle might be forfeited under the Customs Laws, the element of transportation was lacking or the cases were decided on some other ground.

United States *v.* Cahill (C. C. A. 1—1926), 13 Fed. (2d) 83;

United States *v.* One Reo Coupé Automobile (1931, D. C. Mass.), 46 Fed. (2d) 815;

United States *v.* One Lincoln Touring Car (1925, D. C., N. D. N. Y.), 11 Fed. (2d) 551;

United States *v.* One Packard Sedan (1926, D. C., S. D. Fla.), 14 Fed. (2d) 874;

United States *v.* One Reo Sedan (1930, D. C. Mass.), 39 Fed. (2d) 120;

United States *v.* One Nash Auto (1927, D. C. Mont.), 23 Fed. (2d) 126.

In determining what laws are available to the Government for forfeiture, consideration must be given to the dominating enterprise in which the vehicle is then being used. If the substantive offense is importation and the Customs Laws are available to the Government (unless our arguments under Point One are accepted), then forfeiture might be had under those laws; if the substantive offense is concealment with intent to defraud the Government of a tax, then forfeiture might be had under section 3450. (See majority opinion of Mr. Justice Brandeis in *United States* v. *One Ford Coupé*, 272 U. S. 321.) But if the dominating enterprise is transportation, then forfeiture must be under the provisions of section 26, National Prohibition Act. *Commercial Credit Company* v. *United States*, 276 U. S. 226; *Richbourg Motor Company* v. *United States*, 281 U. S. 528.

In the *Richbourg case*, this court recognizes that it was the protection of the rights of innocent parties that required giving effect to section 26 and prohibited the use of "other applicable statutes". (See *The Standard Coaster* (1932, D. C., E. D. N. Y.), 55 Fed. (2d), 306, at 307.) Mr. Justice Stone there says, at page 534:

> "If the purpose were the more general one of imposing on government officers the general duty to procure forfeiture at their election, either under §26 or any other applicable statute, most of the requirements of §26 might have been omitted."

In the *Richbourg case*, the driver had been arrested and convicted under section 3450 "for the removing and concealing spirits with intent to defraud the government of the tax". (281 U. S. 528, at p. 531.) In *Commercial Credit Company* v. *United States* (276 U. S. 226, at p. 229), the driver of the car was convicted of possession and the charge of transportation was dropped. Nevertheless, this Court in

the *Richbourg case* recognized that transportation was the dominating enterprise and said (281 U. S. 528, at p. 535): "* * * there can be few cases of illegal transportation which do not involve the concealment of nontax-paid liquor." And in *Commercial Credit Company* v. *United States,* this Court again recognized that transportation was the substantive offense, and that the possession was involved in and incidental to the transportation. (See 276 U. S. 226, at 232).

In *United States* v. *One Reo Coupé Automobile* (1931, D. C. Mass.), 46 Fed. (2d) 815, where the car was forfeited under the Customs Laws, the court holds that the importation in violation of the Customs Laws was the dominating enterprise, and in fact there was no evidence of transportation. The court there says, at page 818: "It is impossible to conceive of any case of smuggling where the element of transportation would not have been at some time present, but here the substantive crime was a violation of the customs laws", and further, at pages 818 and 819: "I still think it to be possible for the government to obtain forfeiture of a vehicle used in the smuggling of dutiable merchandise even if such merchandise is intoxicating liquor, *but the smuggling of the liquor, and not the transportation of it, must be the real offense,* * * *"*

District Judge Strum of the Southern District of Florida in the recent case of *United States* v. *One Buick Coupé* (1931, D. C., S. D. Fla.), 54 Fed. (2d) 800, says, at page 802:

> "The dominant character of the enterprise in which the vehicle is engaged when captured, to be deduced from the facts of each case, is the controlling test in determining the appropriate procedural statute."

* * * * * *

"If the paramount purpose of the enterprise in which the vehicle is presently engaged when captured, is to move the situs of the liquor from one place to another, for which purpose the vehicle is primarily in use as a conveyance only, the dominant character of the enterprise is transportation, and it is the mandatory duty of the United States to proceed under Section 26 of the National Prohibition Act."

* * * * * *

"The fact that the driver pleaded guilty to an offense under the customs laws does not, standing alone, authorize a forfeiture under those laws, since the facts otherwise show that the vehicle was engaged in pure transportation."

In all the cases at Bar the cars had never crossed the boundary line. They were always in Texas. The liquor was loaded upon them in Texas. They were used to transport the liquor within the State of Texas. Therefore, we have the dominant enterprise and the substantive offense clearly established as a transportation of intoxicating liquor and, under the prior decisions of this court, the forfeiture proceedings should have been brought under section 26 of the National Prohibition Act, thereby protecting the rights of the innocent lienors.

We cannot await the service of the Government's brief in preparing our brief, for these cases are now on the day calendar. We do not know what the Government will contend, but probably it will urge as it has in other courts, that Sections 602-604 of the Tariff Acts of 1922 and 1930 (19 USCA 1602-1604) are equally as mandatory as the provi-

sions under Section 26 of the National Prohibition Act. If such arguments are advanced, we respectfully call the Court's attention to the language of Section 604 (19 USCA 1604), which section requires the United States attorney to inquire into the facts of the cases reported to him, and if forfeiture has been incurred, "forthwith to cause the *proper proceedings* to be commenced and prosecuted." We submit that "proper proceedings" as intended by that statute would mean proceedings under Section 26 of the National Prohibition Act in the cases at Bar, since proceedings under that Act would protect the rights of the innocent, as Congress intended.

Conclusion.

It is difficult for those interested in the automobile industry to understand why the Government has so persistently sought to forfeit the rights of automobile dealers, finance companies and other innocent parties in the automobiles used in the transportation or importation of intoxicating liquor, and why, in the enforcement of national prohibition, recourse should be had to those harsh statutes which so unjustly penalize the innocent. At nearly every cross-road throughout the country will be found automobile dealers concerned with the threatened jeopardy of their rights in cars. Where dealers are negligent or culpable in selling cars to bootleggers, the National Prohibition Act does not protect them. It protects only the innocent. It has seemed to us that the Government has not followed the advice of the Chief Justice when in his address to the Federal Bar Association at Washington, D. C. on February 11, 1931, he said:

> "* * * The solicitors in the various departments may render * * * an important service in keeping down the volume of litigation by not attempting to force statutes to an extreme construction. * * * There is abundant opportunity for common sense even in administering laws. * * *"

Furthermore, it does not seem to us that the government has accepted the admonition in the dissenting opinion of Mr. Justice McReynolds, in *Carroll et al.* v. *United States,* 267 U. S. 132, where, at page 163, he says:

> "The damnable character of the 'bootlegger's' business should not close our eyes to the mischief which will surely follow any attempt to destroy it by unwarranted methods."

It has been difficult for most of the federal courts to accept the idea that the automobile has the power of complicity and guilt in the wrong. In *United States* v. *One Ford* (1927, D. C. Neb.), 21 Fed. (2d) 628, at 629, the court says this is due to the fact that:

> "The Mosaical law and certain practices among the Athenians are referred to for analogies, rather than any idea current since the Christian era."

Judge Learned Hand, in *Edwards* v. *The Motor Vessel K. 22845* (C. C. A. 2—1932), 55 Fed. (2d) 671, at 672, says:

> "In forfeiture the *res* by an archaism is conceived of as itself the offender."

This Court, in *J. W. Goldsmith, Jr.-Grant Company* v. *United States,* 254 U. S. 505, says that:

> "* * * whether the reasons for §3450 be artificial or real, it is too firmly fixed in the punitive and

remedial jurisprudence of the country to be now displaced."

In *Van Oster* v. *Kansas*, 272 U. S. 465, at 468, this Court again says that this thought has been too well established now to be disturbed. Nevertheless, we submit that the deodand theory is wrong in equity and justice (see "Automobile Forfeitures and the Eighteenth Amendment", by Roy W. McDonald, 10 Texas Law Review 140), and that a wrong can always be uprooted no matter how deeply it is imbedded.

We trust we will not be considered presumptuous in suggesting that this Court may well turn the face of this old idea to the wall, but if it is not in order for us to make this suggestion, it certainly is proper for us to urge, as was said in *United States* v. *Katz et al.*, 271 U. S. 354, at 357, that

> "A literal application of a statute, which would lead to absurd consequences, should be avoided * * *."

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Respectfully submitted,

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